Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

RAYMOND J. MAYNES, JR.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did respondent deprive the petitioner of his right to trial by an "impartial" jury under the Sixth Amendment of the United States Constitution?

2. Did respondent deprive the petitioner of his right to "due process of law" under the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Raymond J. Maynes, Jr., the petitioner, and the People of the State of Colorado, the respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Raymond J. Maynes, Jr., respectfully requests that a writ of certiorari be issued to review the order and judgment of the Colorado Supreme Court and the Colorado Court of Appeals affirming the judgment and conviction of the petitioner in the District Court for the 2nd Judicial District of the State of Colorado.

OPINION BELOW

The order of court of the Colorado Supreme Court is contained in the Appendix (App. A). The judgment of the Colorado Court of Appeals is contained in Appendix (App. B).

STATEMENT OF JURISDICTION

The judgment of the Colorado Supreme Court was entered on January 14, 2002 denying the petitioner's petition for certiorari in the state court seeking review of the judgment of the Colorado Court of Appeals dated July 19, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are:

The petitioner's right to a fair and impartial jury under the Sixth Amendment to the United States Constitution which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The other constitutional provision involved is the petitioner's right to due process of law under the Fifth Amendment to United States Constitution which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Background of Material Facts:

During the early evening hours of December 17, 1998 petitioner received a telephone call at his residence from Troy Aragon during which telephone call Aragon asked him if he would like to get "high" on marijuana that evening. Petitioner accepted the invitation. A short time later, Aragon picked up petitioner at his residence and informed him that he was going to pick up a friend, Jesse Barrios, who was unknown to the petitioner, to arrange for a purchase of marijuana. Neither Aragon nor Barrios informed petitioner of the quantity of marijuana that they intended to purchase. Petitioner did not know Frank Hernandez, the person from whom Aragon and Barrios intended to purchase the marijuana.

On prior occasions Aragon extended similar invitations to petitioner at which times small quantities of marijuana were purchased and consumed by the two.

Prior to taking any actions regarding the purchase, Aragon and Barrios discussed, in petitioner's presence, Barrios' desire to purchase a handgun from Aragon and the two agreed upon a price. Aragon then drove to his residence and obtained the handgun that Barrios desired to purchase. Petitioner asked to see the handgun, handled and examined it and then gave it back to Barrios.

Later that evening, after the first attempt to purchase the marijuana from Hernandez failed, the three traveled to the home of Hernandez.

Aragon drove his vehicle into the alley behind Hernandez' residence and parked. Petitioner remained in the

vehicle with Aragon while Barrios went into Hernandez' residence. Later, Barrios returned with Hernandez to complete the transaction. Aragon exited the vehicle to inspect the marijuana. After inspecting the marijuana, Aragon re-entered the vehicle, began to count some U.S. currency and informed petitioner that the purchase of the marijuana would be made. A few seconds later an argument erupted between Barrios and Hernandez before the transaction was completed while petitioner and Aragon were still seated in the vehicle. Seconds after the verbal argument started between Barrios and Hernandez, petitioner then observed a physical struggle between them which prompted him to exit the vehicle to see what was transpiring. Upon exiting the vehicle, Petitioner heard a gunshot, observed Barrios moving backwards towards him, heard three more gunshots and observed the flashes caused by the firing of a handgun by Barrios.

Aragon who was behind the wheel at the time that the gunshots rang out immediately "peeled out" leaving petitioner and Barrios at the scene of the shooting. Barrios then ran past the petitioner and the two of them then ran northbound down the alley from the scene of the shooting with petitioner being about 20 feet behind Barrios. While fleeing the scene of the shooting with petitioner still trailing Barrios, the two ran past the residence of witness Johnson who had heard the gunshots, called 911, and observed Barrios and petitioner proceeding past his residence. Barrios was proceeding down the sidewalk in front of Johnson's residence which is located on the west side of the street while petitioner was proceeding down the east side of the street. Petitioner and Barrios then proceeded on foot to the residence of Aragon who

lived a few blocks away from witness Johnson's residence, again, with Barrios 10 to 15 feet ahead of petitioner. Upon approaching Aragon's residence, petitioner observed Aragon walking from his vehicle towards his residence. Petitioner then observed Aragon and Barrios meet up in the driveway alongside Aragon's residence and heard Aragon say loudly to Barrios "What the fuck happened?" but did not hear a response from Barrios. Petitioner then heard Barrios say to Aragon "Troy, what should I do with the gun?" to which Aragon responded "Give it to me." Petitioner then observed Barrios hand the gun to Aragon who then went into the garage of the residence which was located at the end of the driveway towards the back of the residence. After Aragon came back out of the garage without the gun, Barrios asked Aragon to give him a ride to Frosty's (Robert Castillo) who lived about a mile away from Aragon's residence to which Aragon responded that he would have his (Aragon's) father give him a ride. Petitioner asked Aragon for a ride home and Aragon declined to do so telling him just to go to Castillo's residence where he would meet up with Barrios and petitioner in an hour. Aragon's father then came out of the Aragon residence and gave Barrios and petitioner a ride to Castillo's residence.

Barrios then went into Castillo's residence and petitioner followed. Barrios instructed petitioner to sit down on a nearby couch in the living room and then Barrios went into a nearby bathroom. Petitioner then heard the toilet flush about a minute after Barrios went into the bathroom and heard water running in the sink and splashing sounds for about 7 to 8 minutes. Petitioner then

observed Barrios exiting the bathroom wiping his hands with toilet paper. Barrios looked at petitioner, in a threatening tone told him "If anything goes down, you better not snitch." Petitioner then asked Barrios if he was going to arrange to give him a ride home and Barrios responded affirmatively but indicated that he needed to use the telephone which was located on the porch of the residence. Barrios then walked onto the porch while petitioner remained seated on the couch. Petitioner then observed a police car go by at which time Barrios ran into the house telling petitioner to go into a nearby bedroom. Barrios then poked his head into the bedroom and told petitioner "Stay in here." Petitioner then took off some of his clothing and laid on the bed.

Shortly thereafter, police entered the bedroom, ordered petitioner out of the bed and placed him under arrest. When petitioner was taken outside, Barrios was also outside the residence in custody and mumbled to petitioner "You better not snitch."

After his arrest, Barrios was questioned about his knowledge of the gun and gave police Aragon's name and address. Aragon was arrested and questioned about 4:00 a.m. the following day.

Barrios gave two statements to police one of which was videotaped during which he implicated petitioner. Aragon gave two videotaped statements the day of his arrest and a third months later in exchange for an offer of a plea bargain to a lesser charge.

Petitioner exercised his Fifth Amendment rights and declined to give any statements to the police at any time.

Throughout, the case, petitioner contended that Barrios was the shooter who fired the fatal shots.

B. The Proceedings Below:

On December 24, 1998 petitioner was charged with the crimes of: (1) First Degree Murder, C.R.S. 18-3-102(1)(b); (2) Criminal Attempted Robbery, C.R.S. 18-2-101(1); (3) Conspiracy to Sell/Distribute Marihuana, C.R.S. 18-18-406(8)(b)(III); (4) Special Offender, Controlled Substance, Deadly Weapon, C.R.S. 18-18-407(1)(f); 1-3) and (5) Special Offender, Controlled Substance, Selling, Distributing or possessing within the Grounds of a Public School C.R.S. 18-18-407(2)(a). In addition, Troy Aragon and Jesse Barrios were also charged as co-defendants with crimes related to the events in question in separate filings against them by the respondent.

At a five-day jury trial commencing September 7, 1999 Maynes was tried upon the following charges: (1) First Degree Murder, C.R.S. 18-3-102(1)(b); (2) Criminal Attempted Robbery, C.R.S. 18-2-101(1); (3) Conspiracy to Sell/Distribute Marihuana, C.R.S. 18-18-406(8)(b)(III); (4) Special Offender, Controlled Substance, Deadly Weapon, C.R.S. 18-18-407(1)(f); and (5) Special Offender, Controlled Substance, Selling, Distributing or Possessing within the Grounds of a Public School, C.R.S. 18-18-407(2)(a).

During the course of the trial the petitioner raised the issues involving the improper exclusion of a prospective juror for cause and the admission of evidence which should have been excluded and the exclusion which

should have been admitted addressed by the Fifth and Sixth Amendments to the United States Constitution.

On September 13, 1999 the jury returned its verdict convicting Maynes of all charges set forth in the Amended Complaint/Information: (1) First Degree Murder, C.R.S. 18-3-102(1)(b); (2) Criminal Attempted Robbery, C.R.S. 18-2-101(1); (3) Conspiracy to Sell/Distribute Marihuana, C.R.S. 18-18-406(8)(b)(III); (4) Special Offender, Controlled Substance, Deadly Weapon, C.R.S. 18-18-407(1)(f); and (5) Special Offender, Controlled Substance, Selling, Distributing or Possessing within the Grounds of a Public School, C.R.S. 18-18-407(2)(a).

After his convictions, petitioner filed a timely motion for new trial on September 28, 1999 which was denied by the district court on September 29, 1999 without a hearing or written findings. A judgment of conviction upon the jury's verdict was entered on November 8, 1999. On November 8, 1999 the district court sentenced petitioner to life imprisonment. On November 15, 1999 Maynes filed a timely notice of appeal of his conviction. After briefing of the issues by the parties on July 19, 2001, the Court of Appeals issued its opinion and judgment affirming the district court and the petitioner's convictions. On August 16, 2001 the petitioner filed a petition for rehearing in the Court of Appeals which was denied on August 23, 2001. The petitioner filed a timely petition for writ of certiorari in the Colorado Supreme Court on September 24, 2001 which petition was denied on January 14, 2002.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

At the trial of this matter in the state district court the petitioner was deprived of his right to trial by a fair and impartial jury by virtue of the fact that the trial court inappropriately excused a juror on a cause challenge by the respondent when said juror upon *voir dire* said nothing which rose to the level of rendering him unable or unfit to serve as a juror at the petitioner's trial and the appellate court erred in affirming the trial court's action excusing said juror on the basis of cause.

II.

THE PETITIONER WAS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

At the trial of this matter in the state district court the petitioner was denied his rights under the Fifth Amendment to the United States Constitution by virtue of the trial court admitting into evidence that should have been excluded and excluding from the evidence certain evidence that should have been admitted.

ARGUMENT

I.

The Trial Court's Granting of the Cause Challenge of the Respondent Against Prospective Juror Markus Childress Was Error in Light of the Responses by this Prospective Juror.

During the course of the voir dire examination of the jurors by the parties, prospective juror Markus Childress expressed reservations about serving as a juror at trial in light of his religious convictions expressing his belief that only God knows if the defendant is guilty or not. After the voir dire examination was concluded, the respondent challenged two members of the prospective jury panel for cause including Mr. Childress. Petitioner opposed the respondent's cause challenge of prospective juror Childress stating the basis of his objection but the trial court granted the respondent's cause challenge as to prospective juror Childress after further questioning by the trial court. After the respondent made its challenge, the trial court engaged in further questioning of Mr. Childress and, as a final question to him, inquired as to whether or not, in his best judgment, he thought that he could sit and perform the task or would be unable to do so to which Mr. Childress responded "I *think* not." (Emphasis added) It was apparent that Mr. Childress was uncomfortable with the prospects of serving as a juror but none of his previous responses were indicative of any unfitness to serve. The trial court asked no follow-up questions after Mr. Childress' last answer and then simply excused him from service in the case. C.R.S. §16-10-103(1)(j) allows a cause challenge against a juror only under circumstances which demonstrate the "existence of a state of mind evincing enmity or bias towards the defendant or the

state." The response of Mr. Childress did not demonstrate any bias whatsoever towards either party and, therefore, the cause challenge should not have been granted. It is a long-standing principle that a cause challenge against a juror should only be granted under circumstances which demonstrate an inability to act impartially. See *Jones v. People*, 47 P. 275 (Colo. 1896). The totality of the responses from Mr. Childress demonstrated no such inability to act impartially and the trial court should have inquired further of Mr. Childress to determine if any there was. The state court of appeals suggested that the respondent's cause challenge against Mr. Childress was granted without objection from petitioner's counsel. When the cause challenge was made, petitioner's counsel responded:

> I think he's capable of rendering a verdict based on the evidence. I don't think in his responses they were hesitant he wouldn't – doesn't relish the fact that he might be required to perform this function that the court may ask him to perform. I don't think that he said anything that would disqualify him.

As indicated in the court of appeals' order and judgment, Mr. Childress responded with "I *think* not." (Emphasis added) when asked why by the trial court if he could perform this (jury task). This response fails to rise to the level of rendering Mr. Childress unfit or unable to have served as a juror. The trial court was demonstrably far too hasty in granting this challenge without making further inquiry of this prospective juror.

II.

The Trial Court Erred By Admitting Into Evidence the Videotaped Statement of Co-defendant Barrios.

During the second day of the trial the People called co-defendant Jesse Barrios as a witness to testify regarding the events resulting in the death of the victim in which he implicated petitioner as the primary participant in the crime (the shooter). On the third day of the trial, the day following co-defendant Barrios' live courtroom testimony, the respondent then called Detective Frank Harrington of the Denver Police Department, one of the investigators assigned to the case, who had interviewed Barrios in the early morning hours of the day following the homicide. Detective Harrington testified that he advised Barrios of his rights and began interviewing him at approximately 3:30 a.m. and videotaped a second interview with Barrios a few hours later at 6:07 a.m. Detective Harrington further testified that the information and statements provided to him by Barrios during the course of both interviews were consistent. Detective Harrington then identified Exhibit 42 as the videotaped statement taken from Barrios and the respondent moved for its admission into evidence over the objection of defense counsel. The trial court reserved ruling on the admissibility of Exhibit 42 later taking up the issue outside of the presence of the jury. The trial court indicated its concern in allowing the jury to view videotaped statements such as Exhibit 42 referencing that there was case law from " . . . your friendly neighborhood Court of Appeals that doesn't like taped prior statements going back to the jury, because that *emphasizes* that kind of testimony . . . " (Emphasis added) The trial court further expressed its concern that "wholesale" reinforcement of

testimony of witnesses, reinforced by taped interviews, might run afoul of the sensitivities of the Court of Appeals. It should be noted that the trial court earlier sustained the defense's objection to Exhibit 45 which was the videotaped statement also taken by Detective Harrington from another prosecution witness in the case, Robert Castillo (Castillo was not charged in the case). Despite its earlier reluctance to admit Exhibit 42 and the concerns it earlier expressed, the trial court nonetheless admitted Exhibit 42 over the objection of counsel and it was published to the jury in its entirety thus depriving the petitioner of due process of law.

Rule 403 of the Colorado Rules of Evidence provides that evidence, although relevant, may be excluded if the probative value of the evidence " . . . is substantially outweighed by the danger of unfair prejudice, ... or needless presentation of cumulative evidence." See *Merritt v. People,* 842 P.2d 162 (Colo. 1992). Trial courts, no doubt, have broad discretion to determine admissibility of evidence and to weigh the probative value of the evidence against its prejudicial effect. See *People v. Eggert,* 923 P.2d 230 (Colo. App. 1995) However, this broad discretion should be cautiously applied in cases such as the instant case where the stakes were extremely high. When applying this balancing test, the trial court should consider the logical force of the evidence and the proponent's *need* for the introduction of the evidence. See *Martin v. People,* 738 P.2d 789 (Colo. 1987) In the instant case there was absolutely no need to publish Exhibit 42 to the jury as Barrios has already testified at the trial as did Detective Harrington regarding his interviews of Barrios immediately following the crime. The trial court, in

applying this balancing test, was also required to take into account the other evidence admitted at the trial. See *Cherry Creek School District No. 5 v. Voelker by Voelker*, 859 P.2d 805 (Colo. 1993) Exhibit 42 was highly prejudicial, had absolutely no probative value whatsoever, unnecessarily emphasized Barrios' version of the shooting incident and was nothing more than cumulative. The introduction of Exhibit 42 at trial was manifestly arbitrary, unreasonable and unfair and was, therefore, a clear abuse of discretion thus denying the petitioner of due process of law. See *People v. Nuanez*, 973 P.2d 1260 (Colo. 1999) What other purpose did the introduction of Exhibit 42 serve other than to further the People's desire to engage in "piling on"? Petitioner's contention that the trial court's action constituted error is further bolstered or reinforced by the fact that, as indicated above, the trial court had serious reservations about admitting Exhibit 42 into evidence in the first place and earlier excluded the admission of a similar videotape (Exhibit 45 – Castillo videotape).

The Trial Court Erred in Sustaining the Respondent's Objection to Questions by Defense Counsel of Witness Esquibel Regarding Warnings Received by the Victim Regarding Co-defendant Barrios.

During the course of the respondent's case, witness Esquibel testified that he was with the victim at the victim's house immediately prior to, during and after the homicide. During the course of the cross-examination of witness Esquibel, he was asked about the victim's receipt of a telephone call earlier in the evening of the homicide wherein the victim was warned by another party about

being careful dealing with Barrios which information was stated to witness Esquibel by the victim shortly before the homicide. The respondent objected on the basis that the response would involve hearsay. Witness Esquibel was advised by the victim that he had received a telephone call earlier that evening warning the victim about Barrios and witness Esquibel had provided that information to the police officers investigating the homicide. The information was provided during the course of discovery. This information was relevant as it was consistent with the petitioner's theory of the case that Barrios was the person who shot and killed the victim. Although the anticipated responses from witness Esquibel were clearly hearsay, they should have nonetheless been admitted under C.R.E. 803(20) as the anticipated responses related to the relevant issue of the reputation of Barrios for violent behavior. In addition, the anticipated responses should have been admitted under Rule 804 (5) since the the declarant was deceased thus lending itself to the trustworthiness of the statement. Finally, the anticipated responses should have been allowed under the residual exception to the hearsay rule since they were clearly trustworthy. See C.R.E. 807.

The Testimony of Witness Borquez Objected to by Defense Counsel Did Not Constitute "Excited Utterances".

At trial the respondent called witness Borquez who testified about a conversation that she overheard at Castillo's residence where Barrios and Maynes were arrested, at approximately 9:00 p.m. on the evening of the crime. This conversation occurred a considerable period of time

after the shooting. The conversation was between Barrios and another individual, Tomas Ramirez wherein Barrios informed Ramirez that petitioner shot the victim. When witness Borquez was asked by respondent what she heard Barrios say, defense counsel objected on the basis that the statement constituted hearsay, but was overruled by the trial court on the respondent's offer that the statements overheard by witness Borquez were "excited utterances" and thus an exception to the hearsay rule. As testified to by witness Esquibel and countless others at trial, the crime occurred at 4319 Raritan Street, Denver, Colorado. The witness' recollections of the times of the shooting and the conversation overheard by Borquez were clearly approximations. What is not an approximation is the distance between the scene of the shooting and the location where the conversation was overheard which was well over a mile. The testimony of defense witness Johnson was that, after hearing what he believed to be gunshots, he observed two individuals running down the street in front of his residence at 4459 Raritan Street, Denver, Colorado towards West 45th Avenue. The path of travel of the two was north away from the scene of the crime and further from the location of 3960 Kalamath. The persons he observed were later identified as Barrios and petitioner. The testimony given by Barrios at trial was that he and petitioner proceeded from the scene of the shooting to the residence of Aragon located on 4528 Quieto Street, Denver, Colorado. After spending several minutes in front of the Aragon residence and remaining at the Aragon residence while Aragon was attempting to "stash" the handgun used in the crime, the father of

Aragon then gave Barrios and the petitioner a ride to the 3960 Kalamath location.

A conservative estimate of the time of the shooting to the time of Borquez' overhearing Barrios' conversation with Ramirez would reasonably be in the range of 10 to 15 minutes. The excited utterance exception to the hearsay rule clearly applies to statements made spontaneously to a startling event without the opportunity to reflect while the declarant is under the stress of the event and offered to prove the truth of the matter asserted. *Lancaster v. People,* 615 P.2d 720 (Colo. 1980). There is clearly no question that the respondent's proffer of this testimony was an attempt to prove the truth of the matter asserted that petitioner had actually done the shooting. However, the temporal proximity of the shooting and the conversation which was overheard by witness Borquez involved a lapse of too great a time period to constitute an exception under the excited utterance exception. Barrios clearly had a considerable amount of time after the shooting to reflect upon what had occurred and a considerable period of time had elapsed and his remarks to Ramirez were not excited utterances. See *People v. Koon,* 724 P.2d 1367 (Colo. App. 1986). Therefore, in light of the considerable period of time that had elapsed, the trial court should have sustained defense counsel's objection and excluded that portion of witness Borquez' testimony.

The Trial Court Erred in Excluding the Previous Written Statement of Witness Johnson as Such Written Statement Was in Direct Contradiction to the Testimony of Witness Johnson at Trial.

Witness Johnson was called by the defense and during the course of his testimony regarding what he observed very shortly after he heard what he believed to be gunshots, he testified that he observed something in the hand of the larger of the two individuals he observed running down the street in front of his residence. He further testified that the larger of the two individuals he observed running past his residence was wearing a dark jacket with a large Denver Bronco "D" logo on it. Barrios admitted that he was the person wearing the jacket with the Denver Broncos' "D" logo on the back. After testifying that he observed the larger of the two individuals to have had "something" in his hand, witness Johnson shortly thereafter testified that he wasn't "really positive if he did" and finally testified that "I take it that it was a gun." At the conclusion of his direct testimony, witness Johnson testified that he previously advised defense counsel that he had some fear of testifying at trial. On cross-examination, witness Johnson testified that he "assumed" it was a gun and later that all he could determine that the larger of the two individuals had "something in his hands." Defense counsel then offered defendant's Exhibit A which was witness Johnson's signed written statement given to the police on the night of the shooting wherein he stated "I was on the front porch when I seen two Hispanic males running down Raritan St. they both wore black clothing one had a Bronco Jacket on one tall one *had the gun* he had an

orange letter D on and was wearing a hat. They ran towards Chaffee Place." (sic) (Emphasis added) Later on in the written statement, the question was asked "Could you tell what kind of gun it was?" to which the answer "No" was written with witness Johnson's initials next to the answer.

Defense counsel offered Exhibit A which offer was objected to by the respondent asserting that the witness had testified "fairly consistent" with the written statement. The testimony of witness Johnson on direct examination as well as on cross examination was extremely waffling in nature and hardly consistent with his written statement which was very definite that Barrios had a gun in his hand when he and petitioner ran past witness Johnson's residence. Defense counsel, in response to the respondent's objection, stated that the statement makes it clear that the object witness Johnson observed in Barrios' hand was, in fact, a gun. Again, this written statement was clearly corroborative of petitioner's contention that Barrios was the shooter.

Instead of having this highly probative and clearly relevant evidence, the jury was allowed to consider only evidence which could reasonably leave it with the impression that witness Johnson didn't really know what he saw other than that it was "something". The trial court sustained the respondent's objection citing C.R.E. 613 as the basis for its ruling. As indicated above, petitioner's theory of the case was that he had no knowledge prior to the shooting that Barrios intended to rob the victim and further that Barrios actually fired the weapon which killed the victim. Exhibit A unequivocally established

that witness Johnson observed Barrios with the gun in his hand just moments after the shooting.

When shown Exhibit A, witness Johnson was still attempting to equivocate on the issue. The witness' responses when shown Exhibit A were tantamount to a "failure to remember" and the written statement itself should have been admissible under C.R.E. 613. Where a witness does not remember making a prior inconsistent statement or the representations contained therein, the actual written statement is clearly admissible as extrinsic evidence. See *Transamerica Insurance Co. v. Pueblo Gas & Fuel Co.*, 519 P.2d 1201 (Colo. App. 1973). Witness Johnson's waffling recollections of what he saw immediately after hearing the gunshots were tantamount to a failure to remember and, therefore, the written statement should have been admitted into evidence.

In addition, petitioner's Exhibit A was admissible under C.R.S. 16-10-201(1)(a)(b) in that witness Johnson's previous written statement was, again, not entirely consistent with his testimony at trial and, further, the above-referenced statute allows prior inconsistent statements to be used as substantive evidence of facts to which the written statement relates. Considering the totality of the circumstances, namely, witness Johnson's obvious equivocation during his testimony at trial and his fear of testifying should have caused the trial court pause thus allowing the admission of Exhibit A into evidence. Again the petitioner was denied due process of law.

CONCLUSION

For the reasons and arguments stated above, the petitioner requests that his petition for writ of certiorari be granted and that this Court review the decisions of the state courts below.

Dated this 15th day of April, 2002.

Respectfully submitted,

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APPENDIX A

SUPREME COURT,
STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CASE NO. 01SC655

CERTIORARI TO THE COURT
OF APPEALS, 99CA2290
DISTRICT COURT, CITY &
COUNTY OF DENVER, 99CR523

Petitioner:

RAYMOND J. MAYNES, JR.,

v.

Respondent:

THE PEOPLE OF THE
STATE OF COLORADO.

Supreme Court
State of Colorado
Certified to be a
full, true and
correct copy

JAN 14 2002

MAC V. DANFORD
Clerk of the
Supreme Court
Court Seal
By /s/ H. Halverson
Deputy Clerk

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 14, 2002.
JUSTICE COATS does not participate. (SEAL)

cc:

Paul A. Baca
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John D. Seidel, AAG
Appellate Division
Criminal Justice
Section John

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Honorable
J. Stephen Phillips
Denver District Judge
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APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No. 99CA2290
City and County of Denver District Court No. 99CR523
Honorable J. Stephen Phillips, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Raymond J. Maynes, Jr.,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE ROY
Metzger and Davidson, JJ., concur

NOT SELECTED FOR PUBLICATION
July 19, 2001

Ken Salazar, Attorney General, John D. Seidel, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Paul A. Baca, Denver, Colorado, for Defendant-Appellant

Defendant, Raymond J. Maynes, Jr., appeals the trial court's judgment entered on jury verdicts finding him guilty of first degree felony murder; attempted robbery; conspiracy to sell/distribute marijuana; special offender, controlled substance, deadly weapon; and special

offender, controlled substance, selling, distributing or possessing near a public school. We affirm.

In December 1998, defendant and a companion picked up a third party (middleman) to assist in the purchase of marijuana. Defendant claims that his companion then agreed to sell the middleman a gun, which defendant handled and then gave to the middleman.

The middleman arranged for the sale of marijuana with the victim, a dealer who had apparently been warned earlier in the evening that the middleman was dangerous. The victim relayed this warning to a friend.

After a meeting with the victim at a bar failed, defendant, his companion, and the middleman went to the victim's home. The middleman entered the home and returned with the victim, who was carrying a block of marijuana. During the transaction a scuffle occurred in which the victim was shot and killed. The companion, who was alone in the car, drove away and defendant and the middleman ran away from the scene. A witness heard gunshots and saw two men running down the street. In a police report the witness stated that the taller man (the middleman) was carrying a gun.

Defendant, his companion, and the middleman met at the companion's nearby residence, where the companion hid the gun. The three then went to another residence at which a second witness heard the middleman state that defendant had just shot someone. Shortly thereafter the police arrived and arrested defendant and the middleman.

The middleman made two statements to the police in which he identified defendant as the person who shot the victim, the second of which was videotaped. The companion was arrested the following day and made two videotaped statements. Defendant did not make any statements to the police and maintained his innocence throughout trial, where he claimed that the middleman shot the dealer.

At trial, the middleman testified in a manner consistent with his videotaped statement. Defendant sought to impeach the middleman by demonstrating that his statement was elicited in exchange for lenient treatment. In response, the prosecution sought to introduce the middleman's videotaped statement. The court allowed it. Defendant did not attempt to impeach the credibility of the companion, and the court did not allow his videotaped statement into evidence.

I.

Defendant first asserts that the trial court erred by not giving the defense a sufficient opportunity to conduct voir dire. We do not agree.

The right to a fair trial necessarily includes the right to a fair and impartial jury. However, the defense does not have a right to an unlimited voir dire examination of potential jurors. Instead, for the purposes of judicial economy and efficiency, a trial court may place reasonable time limits on voir dire, and its decision to limit it will not be overturned absent an abuse of discretion. If a voir dire is sufficient to allow a party to determine whether any potential jurors possess beliefs or biases that

would prevent a fair trial, a trial court's limits are not an abuse of discretion. *See generally* Crim. P. 24; *People v. Collins*, 730 P.2d 293 (Colo. 1986); *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983).

Defendant argues that the trial court abused its discretion in limiting his voir dire because it was shorter than the prosecution's, because the trial court cut off the defense's voir dire in an abrupt manner, and because the trial court prevented the defense from asking additional questions of the prospective jurors.

Having reviewed the voir dire in its entirety, we are not persuaded. The fact that the prosecution's voir dire spans a few more pages of the transcript than defendant's is not a proper measure, alone, for determining an abuse of discretion. In addition, we note that defendant does not assert, for example, that he was in the process of discovering bias in a potential juror at the time voir dire was cut off. Finally, we note that the trial court allowed both parties additional time with the entire panel after they exercised their first round of peremptory challenges, during which both parties sought to elicit background information in an attempt to ascertain the potential jurors' ability to serve impartially. Thus, we find no abuse of discretion.

II.

Defendant asserts that the trial court abused its discretion in excusing a prospective juror for cause. Again, we disagree.

Section 16-10-103(1)(j), C.R.S. 2000, requires that a court grant a challenge for cause if a juror has "a state of mind . . . evincing enmity or bias toward the defendant or the state." The court must consider the prospective juror's voir dire responses as a whole in determining whether he or she will render a fair and impartial verdict according to the law and the evidence presented at trial. *E.g., People v. Young*, 16 P.3d 821 (Colo. 2001).

The trial court is in the best position to hear the questions and answers, observe the demeanor of the prospective jurors, and discern truthfulness and sincerity. Therefore, absent an abuse of discretion, we will not disturb the trial court's decision regarding a challenge for cause. This standard, which is very high, discourages an appellate court from second-guessing the trial court's judgments on the basis of a cold record. *E.g., Carrillo v. People*, 974 P.2d 478 (Colo. 1999); *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

During voir dire, the prospective juror repeatedly expressed hesitance about being a juror because he held religious beliefs that discouraged him from passing judgment on others. In addition, the prospective juror's answers were somewhat evasive. The court finally asked the prospective juror:

> Court: What I need to know is whether or not in your best judgment you think you can't sit and perform this task, that you wouldn't be able to?
>
> Prospective Juror: I think not.

The prosecution requested that the court excuse the juror for cause, which the court did without objection

from defendant. On appeal, defendant argues that the court abused its discretion in dismissing the juror because the juror expressed neither enmity nor bias toward the state or defendant. However, the juror's stated reluctance to pass judgment on others may be considered bias against the state and affect his ability to render a fair and impartial verdict based on the evidence.

Thus, in light of the deferential standard of review, we conclude that it was not an abuse of discretion for the trial court to dismiss the juror for cause. *Cf. People v. Vecchiarelli-McLaughlin,* 984 P.2d 72 (Colo. 1999).

III.

Defendant asserts that the trial court abused its discretion in admitting the middleman's videotaped statement because it was cumulative and unfairly prejudicial. We disagree.

A trial court has broad discretion concerning the admissibility of evidence, and its decision will not be overturned on appeal absent an abuse of discretion. *People v. Eppens,* 979 P.2d 14 (Colo. 1999).

At trial, defendant attempted to impeach the middleman's credibility by showing that he agreed to make a statement to the police implicating defendant in exchange for lenient treatment. In response, the prosecution moved to introduce the videotape pursuant to CRE 801(d)(B) to show a lack of recent fabrication. After expressing some hesitation, the trial court admitted the videotaped statement.

Defendant states that the trial court abused its discretion in admitting the tape because its probative value was substantially outweighed by the danger of unfair prejudice and because it was unnecessary when the interviewing officer had already testified about the statement. In addition, defendant points out that the trial court did not allow the admission of the companion's taped statement.

Rule 801(d)(1)(B) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, the statement is consistent with his testimony, and the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. However, prior consistent statements that are offered for rehabilitative purposes are still governed by the general principles of relevancy found in CRE 401, 402, and 403. *People v. Eppens, supra.*

While the middleman's videotaped statement may have been somewhat cumulative and prejudicial, defendant has failed to show with specificity how it was unfairly prejudicial. Thus, given that the videotaped statement was both relevant and properly admitted for rehabilitative purposes, we find no abuse of discretion.

IV.

Defendant asserts that the trial court abused its discretion by not admitting the written statement of the independent witness who saw two individuals running away from the scene of the murder to rebut his testimony. We disagree.

At trial the defense called the witness, who testified on direct examination that he heard several gun shots and then saw two people running down the street. He testified that the taller man was wearing a dark jacket and that he thought the taller man had something in his hand. When asked whether he had made a police statement, he said he couldn't recall. Defendant then refreshed the witness' recollection with his written statement. The witness then stated:

> I did state at the time I did see a gun in his hand, which I'm stating that I am not exactly positive, but he had something in his hand. If it wasn't a gun, I don't know what it could have been.

The witness also testified that he "[took] it that it was a gun" because, at one point, the taller man (the middleman) turned and appeared to be aiming at the neighbor's dog.

On cross-examination, the witness similarly stated that he was not sure that the object in the taller man's hand was a gun. On redirect, defendant sought to introduce the written statement wherein the witness stated that the taller man "had a gun." The prosecution objected on grounds that the witness already admitted the substance of the statement. The trial court agreed and excluded it.

Defendant argues that the trial court abused its discretion in not allowing the written statement into evidence because it is unequivocal and thus rebuts the witness' equivocal testimony.

CRE 613(a) provides that when a witness denies or cannot recall making a prior statement "extrinsic evidence, such as a deposition, proving the utterance of the prior evidence is admissible. However, if a witness admits making the prior statement, additional extrinsic evidence that the prior statement was made is inadmissible."

Here, the witness admitted that he made the prior statement. The fact that he testified about his uncertainty is a clarification, not a denial. Thus, we see no abuse of discretion. *See People v. Eppens, supra.* In addition, we note that the substance of the statement was read to the witness, who acknowledged it. Therefore, any error in excluding the statement was harmless. *See* Crim. P. 52.

V.

Defendant next asserts that the trial court abused its discretion by admitting the statement of the second witness that the middleman stated to her that defendant just shot the victim. Defendant argues the statement was not sufficiently spontaneous to be admitted as an excited utterance. We disagree.

CRE 803(2) provides an exception to the hearsay rule whereby an excited utterance may be admitted if: (1) the event was sufficiently startling to render normal reflective thought processes of the observer inoperative; (2) the statement was a spontaneous reaction to the occurrence; and (3) direct or circumstantial evidence exists to allow the jury to infer that the declarant had the opportunity to observe the startling event. If the evidence supports the trial court's ruling on the admission of evidence, the

appellate court will not disturb it. Because a trial court is in the best position to consider the effect of the startling event on the declarant, it is afforded wide discretion in determining admissibility under the excited utterance exception. *People v. Martinez,* 18 P.3d 831 (Colo. App. 2000).

Here, the prosecution called the second witness-who testified about a conversation she overheard between the middleman and another person in which the middleman said that defendant shot the dealer. The witness also stated that at the time the middleman made the statement, he sounded scared and nervous,was breathing hard as if he had just been running, and was talking very fast. The second witness also stated that the middleman was usually a calm person and never acted in the manner she witnessed.

Defendant argues that because the shooting occurred over a mile away and the middleman went to another residence first where the companion hid the gun, the time between the shooting and the statement was too great for purposes of CRE 803(2). However, while the temporal interval between the startling event and the statement is relevant to determining whether a statement is an excited utterance, it is not conclusive. *People v. Bolton,* 859 P.2d 311 (Colo. App. 1993). Even if the temporal interval spanned several minutes, we conclude that the trial court's decision is supported by the evidence, particularly the second witness' testimony regarding the atypically agitated state of the middleman when he made the statement.

VI.

Defendant asserts that the trial court committed reversible error by not admitting the statement of the victim's friend that the victim told him that he received a phone call in which he was advised that the middleman was dangerous. We disagree.

At trial the prosecution called a friend of the victim who was with the victim at the time defendant and his companions arrived at the victim's home. He observed the middleman come into the home, inspect some drugs with the victim, and exit the home with the victim immediately prior to the shooting. The friend did not observe any disagreement or anger between the middleman and the victim.

On cross-examination, defendant attempted to question the friend about a statement made to him by the victim that the victim had received a phone call that evening warning him about the middleman. The testimony was solicited to support defendant's alternate theory of the crime, that is, that the middleman shot the victim.

When defendant asked the victim's friend what the caller warned the victim about, the prosecution objected, and stated that the answer would be hearsay within hearsay, and the objection was sustained. Defendant did not proffer any exceptions to the rule against hearsay to the trial court that would have permitted the admission of this testimony. On appeal, defendant agrees that the testimony was hearsay but propounds, without further authority or argument, three alternative hearsay exceptions, CRE 803(20), 804(5), and 807.

Given that defendant failed to assert these hearsay exceptions at trial, appellate review is limited to a plain error analysis. Plain error exists only if the error so undermined the fundamental fairness of the trial so as to cast serious doubt on the reliability of the verdict. *Cf. People v. Gilbert*, 12 P.3d 331 (Colo. App. 2000) (plain error analysis on appeal where defendant failed to object to the introduction of evidence).

While we agree that the friend's statement may support defendant's theory of defense, having reviewed the record on appeal we cannot conclude that the failure to admit this evidence under an exception to the rule against hearsay was an error of sufficient magnitude to undermine the fairness of the trial or cast serious doubt upon the jury's verdict.

Judgment affirmed.

JUDGE METZGER and JUDGE DAVIDSON concur.

APPENDIX C

1973 Colorado Revised Statutes

§ 16-10-103. Challenge of jurors for cause

(1) The court shall sustain a challenge for cause on one or more of the following grounds:

* * *

(j) The existence of a state of mind in the juror evincing enmity or bias toward the defendant or the state; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

EVIDENCE OF INCONSISTENT STATEMENTS – VARIANCE

§ 16-10-201. Inconsistent statement of witness – competency of evidence

(1) Where a witness in a criminal trial has made a previous statement inconsistent with his testimony at the trial, the previous inconsistent statement may be shown by any otherwise competent evidence and is admissible not only for the purpose of impeaching the testimony of the witness, but also for the purpose of establishing a fact to which his testimony and the inconsistent statement relate, if:

(a) The witness, while testifying, was given an opportunity to explain or deny the statement or the witness is still available to give further testimony in the trial; and

(b) The previous inconsistent statement purports to relate to a matter within the witness's own knowledge.

APPENDIX D

Colorado Rules of Evidence

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to

admissions of a party-opponent as defined in rule 801(d)(2).

[Amended March 2, 1987, effective October 1, 1987; April 25, 1988, effective November 1, 1988.]

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant –

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision

(b)(3) or (4) his attendance or testimony) by process or other reasonable means.

RULE 807. RESIDUAL EXCEPTION

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Added eff. Jan. 1, 1999.